IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re PETER SAKARIAS, on Habeas Corpus.	)	Supreme Court No. S082299
In re TAUNO WAIDLA, on Habeas Corpus.	)	Supreme Court No. S102401

PETITIONER PETER SAKARIAS'S BRIEF

ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

CLIFF GARDNER
SBN # 93782
2088 Union Street, Suite 3
San Francisco, CA 94123
(415) 922-9404

ROBERT DERHAM
SBN # 99600
524 San Anselmo Avenue
San Anselmo, CA 94960
(415) 457-4946

Attorneys for Petitioner
Peter Sakarias

INTRODUCTION

The State charged Peter Sakarias and Tauno Waidla with the murder of Viivi Piirisild. The defendants were tried separately. Waidla's case was tried first, beginning in January 1990. Sakarias's trial began approximately eight months later, in September 1990. In both trials, the forensic evidence showed the victim received four general types of wounds: (1) blunt force wounds to the head consistent with the blunt edge of a hatchet (2) non-lethal chopping wounds to the head consistent with the sharp edge of a hatchet, (3) a massive-force, fatal sharp-edge hatchet wound to the head, and (4) four stab wounds to the chest consistent with a knife.

The prosecutor, Steven Ipsen, asked for the death penalty in both cases. In Waidla's trial, Ipsen argued that Waidla armed himself with the hatchet -- "the more devastating of the instruments" -- and inflicted **all** the hatchet blows, using both sides of the hatchet, as the victim entered the front room of her home. Sakarias, Ipsen argued, used the "lesser implement, the knife." Ipsen introduced testimony from medical examiner James Ribe about an abrasion on the victim's back caused when the victim was dragged from the front room to a back bedroom. Dr. Ribe testified that this dragging wound was post-mortem. Therefore, Ipsen argued, the victim was killed in the front room and was later dragged to the bedroom

Ipsen urged the jury to sentence Waidla to death because Waidla was "the dominant person between himself and Mr. Sakarias . . . ." It was Waidla who planned both the murder and the robbery. It was Waidla who bludgeoned the victim to death with a hatchet whereas Sakarias inflicted only the less serious stab wounds. And it was Waidla, Ipsen assured the jury, who realized the victim was still alive, and "chose to change the angle of the blade" to "the sharp edge of the hatchet to give that death blow." Ipsen argued this was the "critical point" in deciding whether Waidla would live or die.

The jury was convinced. It sentenced Waidla to die.

The Sakarias trial began eight months later. Once again Ipsen sought the death penalty. Although he presented the same evidence with respect to the number of wounds suffered by the victim, in this trial Ipsen pursued a fundamentally different theory as to who inflicted which blow, where the killing occurred, and which party was dominant.

Now Ipsen argued that the victim was **still alive** when she was dragged to the bedroom, and she was killed in the bedroom by **Sakarias**. Now it was **Sakarias, not Waidla,** who inflicted the massive-force, sharp-edge hatchet wound, and he did so in the bedroom, not the front room. Of course, Dr. Ribe's opinion that the post-mortem back abrasion was caused by dragging the victim to the bedroom was entirely inconsistent with Ipsen's new theory of the case, but the jury never heard this evidence: Ipsen deliberately

refrained from asking Dr. Ribe about the significance of the back abrasion. This allowed Ipsen to spin a new theory, one wholly inconsistent with what he argued in the Waidla trial. And, as to dominance, Ipsen made another about-face: he told the jurors there was "absolutely no evidence" that Waidla was the dominant party.

The jury was convinced. It sentenced Sakarias to die.

Waidla and Sakarias sought post-conviction review. Both filed habeas petitions with this Court alleging that Ipsen had improperly presented inconsistent factual theories in the two cases. The State filed a Return, claiming that Ipsen had not intentionally altered his theory or presented different evidence at the second trial. Instead, the State claimed that any differences between the two trials were simply an accident.

The Court ordered an evidentiary hearing. (In re Sakarias, S082299, Order of January 15, 2003.) The appointed referee, the Honorable Thomas Willhite Jr., presided over the hearing and in December 2003, filed with this Court a 35-page report containing his findings.

Judge Willhite rejected the State's position entirely. He concluded that at the second trial, Ipsen "deliberately refrained" from introducing testimony from Dr. Ribe about the post-mortem dragging wound. According to Judge Willhite, Ipsen did so

because this evidence was "inconsistent with the theory of the killing Ipsen presented at Sakarias' trial" and it was "much easier to omit than explain." Judge Willhite expressly found that Ipsen's presentation of inconsistent theories in these two cases was not inadvertent or the result of failed memory, but "an intentional strategic decision" designed to "maximize the portrayal of each defendant's culpability."

The Court ordered both parties to file post-hearing briefs on the merits. This brief on the merits follows.

STATEMENT OF THE CASE

On November 28, 1988, the Los Angeles County District Attorney filed a seven-count information against Tauno Waidla and Peter Sakarias. (CT 275.)[1] The information charged as follows:

1) Count one charged both defendants with a July 12, 1988, murder in violation of section 187. (CT 276.) This count added two special circumstance allegations, charging that the murder occurred during the course of both a robbery and a burglary in violation of section 190.2, subdivision (a)(17). (CT 276.) Finally, the count added an allegation that -- in violation of section 12022, subdivision (b) -- each defendant used (1) a knife and (2) a hatchet during the offense. (CT 276-277.)

2) Count two charged both defendants with a July 12, 1988, robbery in violation of section 211. (CT 277.) This count repeated the same two section 12022, subdivision (b) enhancement allegations that were charged in count one. (CT 276.)

3) Count three charged both defendants with a July 12, 1988, burglary in violation of section 459. (CT 278.) This count also repeated the section 12022, subdivision (b) enhancements. (CT 278.)

4) Count four charged both defendants with a separate burglary occurring between July 4 and July 12, 1988. (CT 278.) This count added an allegation that the defendants brought property taken in this burglary from one count to another in violation of section 786. (CT 279.)

---

[1] Citations to "CT" denote the Clerk's Transcript on Appeal. All statutory references are to the Penal Code unless otherwise specified.

5) Count five charged both defendants with stealing telephone services between July 5, 1988, and July 15, 1988, in violation of section 502.7, subdivision (a)(1). (CT 279.)

6) Count six charged both defendants with a July 11, 1988, concealment or sale of stolen property in violation of section 496[1]. (CT 280.)

7) Count seven charged Mr. Sakarias alone with grand theft auto in violation of section 487, occurring between, June 30, 1988, and August 1, 1988. (CT 280.)

Both defendants pled not guilty and denied the enhancing allegations. (CT 302.)

On November 16, 1989, the trial court declared a doubt as to Mr. Sakarias's competence to stand trial. (CT 340.) It appointed several mental health experts to examine him. (CT 340.) After a hearing under Penal Code section 1368, the court found defendant incompetent to stand trial and suspended proceedings against him. (CT 357.) Sakarias was sent tp Atascadero State Hospital for treatment. Proceedings against co-defendant Waidla went forward, however, and the cases were severed at that point.

On or about January 15, 1990, the court received a report that Mr. Sakarias had regained his competence. (CT 375.) The court held a hearing on May 31, 1991. Submitted by both parties on the reports, the court found defendant to be competent to

stand trial. (CT 393.)

Trial began in September 1991. (CT 461.) The people rested their case on October 9, 1991. (CT 473.) The defense presented no evidence and rested that same day. (CT 473.) The jury convicted Mr. Sakarias of murder with special circumstances. (CT 578-590.)

After a short penalty phase, the jury began deliberations. (CT 609.) During the course of a 12-hour deliberation, the jury informed the court it was unable to reach a verdict. (CT 608-611, 627.) The jurors were told to continue their deliberations and eventually returned a death sentence. (CT 627.) The trial court denied Mr. Sakarias's automatic motion to reduce the penalty pursuant to section 190.4 and imposed a death sentence. (CT 633-636.) On appeal, this Court affirmed Mr. Sakarias's conviction and sentence. (People v. Sakarias (2000) 22 Cal.4th 596.)

STATEMENT OF FACTS

The Undisputed Facts About The Homicide Presented At The Two Trials.

At both trials, the state presented evidence of (1) a large pool of blood in the living room and (2) drag marks from the living room to the bedroom where the body was found. (RTW 112-115, 1797-1807, 1847, 1882, 1956-1975, 1979-1983; RTS 859-900, 877-878, 909.)[2] **Based on the amount of blood, police estimated the victim remained on the living room floor "at least several minutes, possibly as long as ten or fifteen minutes." (RTS 900.)**

At both trials, medical examiner James Ribe testified for the prosecution regarding the wounds inflicted. Dr. Ribe found several different types of wounds: (1) blunt force wounds from the blunt edge of a hatchet, (2) three "chop wounds" from the sharp edge of a hatchet, and (3) four stab wounds from a knife. (RTW 1503, 1506, 1548-1601, 1602-1620; RTS 1328, 1331, 1341, 1343-1347, 1361-1368, 1386-1387.) Of the three chop

[2] "RTW" refers to the Reporter's Transcript of the Waidla trial, prepared in connection with the automatic appeal in People v. Waidla (2000) 22 Cal.4th 690. "RTS" refers to the Reporter's Transcript of the Sakarias trial, prepared in connection with the automatic appeal in People v. Sakarias, supra, 22 Cal.4th 596.

wounds, one was inflicted while the victim was alive; two occurred after death. (RTW 1626-1627.) The single pre-mortem hatchet blow was a fatal wound. (RTW 1627.)

In both trials, Ipsen asked Dr. Ribe to describe this pre-mortem hatchet wound in detail. The doctor explained that the wound was "near the top of her head, but somewhat forward toward the forehead, above the hairline and slightly to the left of the midline." (RTW 1607-1608; see RTS 1387.) The wound was far more severe than the two other chop wounds; it was caused by "a very powerful blow," one that required "a tremendous amount of force," and "could be a fatal blow." (RTW 1627; RTS 1393-1394.)

At both trials, Ipsen argued that Waidla inflicted all of the blunt force wounds with the hatchet. (RTW 2956, 3059, 3069-3070; RTS 1520-1521.) At both trials, he argued that Sakarias inflicted the stab wounds. (RTW 2840, 2842; RTS 1519.)

There were two major differences in Ipsen's presentation of evidence and argument in the two cases. The first difference concerns the sharp-edge wounds, particularly the massive-force, pre-mortem wound which Ipsen characterized as the "death blow." The second concerns who, between Waidla and Sakarias, was the dominant party in the planning and carrying out of the crime.

The Inconsistent Evidence and Arguments.

A. Inconsistencies about who inflicted the massive-force, pre-mortem, sharp-edge hatchet wounds and where the victim died.

1. The Waidla trial.

At the Waidla trial, prosecutor Ipsen elicited testimony from Dr. Ribe about the four stab wounds, the three sharp-edge chopping wounds and the blunt force trauma. (RTW 1503, 1506, 1548-1601, 1602-1620.) Ribe explained that of the three chop wounds, only one -- the massive-force wound -- was inflicted while the victim was alive. (RTW 1626-1627.)

Significantly, however, Ipsen also asked Dr. Ribe about an abrasion on the victim's back, first noted by Dr. Ribe in his autopsy report. (RTW 1631; See Evidentiary Hearing, Sakarias Exhibit F [Autopsy Report] at p. 2 ["Post-mortem abrasion over the sacrum, dried yellow, (was red at-the-scene)."].) In response to Ipsen's questions, Dr. Ribe testified that this abrasion was consistent with the victim having been dragged across a carpet from one room to another. (RTW 1631-1632.) Dr. Ribe explained that this abrasion occurred **after the victim was dead**. (RTW 1633.) Through Dr. Ribe, the prosecutor introduced a photograph of this wound. (RTW 1631.)

During his closing argument, Ipsen specifically relied on Ribe's testimony about the post-mortem dragging wound. With some force, Ipsen told the jury this evidence proved the victim must have died in the living room:

> "[W]e know she was dead in the front room of her home in her living room. We know she did not live to see or be dragged back into her bedroom, because the coroner testified and told you that the burn mark on her back, as she was dragged, the abrasion on her back was a postmortem, or an after death wound." (RTW 2843.)

This fact was evidently important to Ipsen's theory of the case against Waidla, because he repeated it for emphasis:

> "At the point that she was dragged into the back room, we know that [Ms. Piirisild] was already dead by the facts as the coroner testified. So we know that it was in the front room that [the victim was killed]." (RTW 2843.)

Dr. Ribe's expert testimony and Ipsen's argument both told the jury the victim was dead when dragged to the back bedroom. This meant that wounds inflicted **before** the victim was dead had to have been inflicted in the living room. Conversely, wounds inflicted **after** the body was dragged into the bedroom were necessarily post-mortem.

Based on this, Ipsen told the Waidla jury that the sharp-edge chopping wounds were inflicted in the living room. (RTW 2843.) He argued it was Waidla who struck the

victim with both the blunt and sharp end of the hatchet. (RTW 3059, 3067-3070.) As the referee concluded, in the Waidla trial Ipsen argued "Waidla inflicted all the hatchet wounds, blunt edged and chopping." (Referee's Report at 26.) Significantly, according to Ipsen it was the fact that Waidla used **both** sides of the hatchet that was the "critical point" the jury should remember in deciding upon the death penalty:

> "Tauno Waidla chose to change the angle of the blade. He found that while her unconscious body lay at his feet that the bludgeoning end of the hatchet, the blunt end, was not sufficient, because it was not carrying out his plan. Although he felt her head and her flesh against the back of his hatchet numerous times, he knew his mission was accomplished, and that's when he changed and used the sharp edge of the hatchet to give that death blow." (RTW 3069-3070.)

The jury imposed a death sentence on Waidla. Two months later, in March of 1991, Waidla moved to modify the sentence to a term of life without parole. Ipsen defended the death verdict and the trial court affirmed it. In so doing, the trial court expressly adopted the exact view of the evidence that Ipsen had presented to the jury only months earlier. Just as Ipsen argued, the trial court found that Waidla "murdered [the victim] with both the sharp and blunt edge of a hatchet while a co-participant stabbed her multiple times with a knife." (RTW 3147.)

2. The Sakarias trial.

The Sakarias trial began in September of 1991, only six months after the trial court's ruling. Just as in the Waidla trial, prosecutor Ipsen asked Dr. Ribe about the four stab wounds, the blunt force trauma, and the three sharp-edge chop wounds. (RTS 1328, 1331, 1341, 1343-1347, 1361-1368, 1386-1387.)

At this trial, however, Ipsen dramatically altered his strategy. He did **not** ask Dr. Ribe about the abrasion on Ms. Piirisild's back. He did **not** introduce any testimony about the post-mortem nature of this wound. He did **not** introduce the photograph of this wound he had introduced at the Waidla trial. He did **not** argue that the victim was killed in the living room. He did **not** argue she was already dead when dragged to the bedroom. He did **not** argue that Tauno Waidla inflicted all the hatchet wounds, including the massive, pre-mortem sharp-edge hatchet wound "to give the death blow."

Instead, in the Sakarias trial, Ipsen adopted a completely new theory. He claimed that it was **Sakarias** who inflicted all three sharp-edge hatchet wounds, including the massive-force pre-mortem wound. (RTS 1521-1522, 2440, 2447.) In contrast to the Waidla trial, Sakarias was no longer portrayed as the less culpable party. No longer was Sakarias's only act a repetitious stabbing motion which contrasted with Waidla hitting the victim with the blunt edge of the hatchet, realizing she was still alive, and "choos[ing] to

change the angle of the blade" to use the sharp edge of the hatchet. (RTW 3069.) Instead, the jury was urged to impose death on Sakarias because "both used the hatchet." (RTS 2440.)

And, to conform to Sakarias's confession, prosecutor Ipsen urged the jury to find a different place of death. No longer were all the fatal wounds inflicted by Waidla while the victim was in the living room. (RTW 2843.) No longer was the victim already dead when she was taken into the back room. (RTW 2843.)

Instead, now it was Sakarias who inflicted the wounds with the sharp edge of the hatchet. (RTS 2447.) Now, the victim was alive when she was pulled into the bedroom. (RTS 1521-1522.) Now it was Sakarias who hit her with the sharp edge of the hatchet in the bedroom, "thus finally ending her life." (RTS 2447.)

B. Inconsistencies as to who was the dominant party.

At the penalty phase of a capital trial, one circumstance the jury may consider in mitigation of the offense is the relative culpability and participation levels of the principals. (Pen. Code, ¶ 190.3, subd. (k); People v. Malone (1989) 47 Cal.3d 1, 58 ["Because this was a two-person crime and much of the defense was directed to placing primary responsibility on Crenshaw, defendant's relative culpability was relevant."];

Green v. Georgia (1979) 442 U.S. 95, 97 [relative culpability is a "critical issue" in the penalty phase of a capital trial].) Thus, if one of two defendants is neither the planner, the one who initiated the crime, nor the one who struck the most forceful and fatal blows, and if that defendant acted at the behest of the other defendant, the jury may consider this and find the subordinate defendant to be undeserving of the death penalty.

In this case, prosecutor Ipsen made starkly inconsistent arguments regarding the relative culpability of the parties. In the Waidla trial, he assigned primary responsibility to Waidla and described a subordinate role for Sakarias. In the Sakarias trial, Ipsen told the jury Sakarias did **not** have a subordinate role at all, but was every bit as culpable as Waidla.

1. The Waidla trial.

In the Waidla trial, Ipsen argued that Waidla was the dominant party: "He is not the one who is dominated by another, but instead the facts indicate that he was the dominate [sic] person between himself and Mr. Sakarias, that he was the planner, he was the one who knew of the Piirisild home and knew of the facts surrounding the burglary, the robbery of Mrs. Piirisild." (RTW 3062.) Twice Ipsen described Waidla as "the planner." (RTW 3061, 3062.)

2. The Sakarias trial.

In the Sakarias trial, Ipsen did not claim that Waidla was the "dominant person between himself and Mr. Sakarias." (RTW 3062.) Nor did he claim Waidla was "the planner," the person who planned both the robbery and the burglary. (RTW 3061.) To the contrary, it was proper that Sakarias should be executed because there was "absolutely no evidence of domination." (RTS 2440.) Now, "in every respect, Peter Sakarias was a partner of Tauno Waidla." (RTS 2440.)[3]

The Appeal.

---

[3] **Just as Ipsen chose not to present testimony from Dr. Ribe about the post-mortem back wound to the Sakarias jury, so too he chose not to present important "relative culpability" evidence to the Sakarias jury. Thus, the Waidla jury heard that Waidla had written a letter to Sakarias only two months before the homicide, not only telling Sakarias that he (Waidla) could no longer "stand to stay here [at the Piirisilds'] until the end of June," but going further and proposing to "get rid of those damn Estonians for once finally." (RTW 2019-2030, 2043; People v. Waidla, A711340, People's Exhibit 119; People v. Waidla, S020161, Brief for California at p. 6, n.2 [quoting the letter in full].)** Ipsen did not present this evidence in the Sakarias trial.

On appeal, Mr. Sakarias raised a series of claims in connection with the prosecutor's use of inconsistent evidence and factual theories at the two trials. (People v. Sakarias, Appellant's Opening Brief ("AOB") 97-124.) This Court elected not to address the matter on appeal, noting that the appellate record would not contain "any explanations the prosecutor may have been able to offer" for the inconsistent positions. (People v. Sakarias, supra, 22 Cal.4th at p. 635.) The Court observed that such explanations could include "whether, in the period between the two trials, significant new evidence surfaced . . . such that the prosecutor, at the time of defendant's trial, neither knew nor had reason to know his argument was false." (Ibid.) Accordingly, the Court held the matter would be addressed in habeas proceedings. (Ibid.)

The Habeas Proceedings In This Court.

Mr. Sakarias raised the inconsistent theory issue again in his habeas petition. (In re Sakarias, S082299, Petition for Writ of Habeas Corpus 46-69.) The Court solicited informal briefing from the state.

In this round of briefing the State first echoed the Court's own observations, arguing there was nothing improper about the prosecutor's conduct because he could have "acquired new information or had other reasons for reassessing the evidence following the first trial." (Informal Reply ("IR") 30.) Alternatively, respondent argued that -- in

fact -- Ipsen did not really present inconsistent arguments after all. (IR 33.)

The Court issued an Order to Show Cause, requiring a formal return from the state on the inconsistent theory issues. (In re Sakarias, S082299, Order of June 27, 2001.) In its formal return, the State abandoned the suggestion made in its informal reply that Ipsen intentionally switched theories because he "acquired new information or had other reasons for reassessing the evidence following the first trial." Instead, in a written declaration, Ipsen claimed he presented different theories because he "did not remember" the theory he had presented at the first trial. (In re Sakarias, S082299, Respondent's Return, Exhibit A [Declaration of Steven Ipsen ("Ipsen Declaration")] at para. 3-4.)

Ipsen admitted that in the Waidla trial he introduced and relied on evidence of the post-mortem abrasion on the victim's back. (Ipsen Declaration at para. 3.) He also admitted he had **not** introduced such evidence at the Sakarias trial. (Ibid.) Ipsen explained in his declaration that the failure to introduce the evidence or discuss the point at the Sakarias trial was unintentional -- he simply forgot:

> "When I prosecuted Sakarias, approximately nine months after Waidla had been sentenced to death, I had forgotten about the postmortem abrasion and any significance it might have." (Ibid.)

Similarly, Ipsen admitted that in the Sakarias trial he argued Sakarias inflicted the

massive-force, sharp-edge hatchet wound. (Ipsen Declaration at para. 4.) He admitted he had "argued something different" at the Waidla trial. (Ibid.) Once again, Ipsen explained that he simply forgot his earlier position:

> "When I argued that Sakarias inflicted the hemorrhagic wound, I did not remember that I had argued something different to the Waidla jury."

In connection with his inconsistent positions as to who was the dominant party, Ipsen did not claim a failure of recollection. (Ipsen Declaration at para. 6.) Instead, although his argument may have been inconsistent, he never "meant" it to be. (Ibid.)

After receiving Ipsen's written explanation this Court ordered an evidentiary hearing with the following reference questions:

> "1. Was prosecutor Steven Ipsen's argument of inconsistent factual theories to the juries in the trials of petitioners Waidla and Sakarias intentional or inadvertent?
>
> "2. (A) Did Ipsen believe, at the time of Sakarias's trial, that the murder victim, Viivi Piirisild, was already dead at the time she was dragged from the living room to the bedroom? (B) Did he have reason to believe Piirisild was dead when moved to the bedroom?
>
> "3. At Sakarias's trial, did Ipsen deliberately refrain from asking the medical examiner, Dr. James Ribe, about a postmortem abrasion on the victim's back?
>
> "4. At Waidla's trial, did Ipsen refrain from seeking admission of

> Sakarias's confession into evidence because it contradicted the factual theory he intended to argue to the Waidla jury?" (In re Sakarias, S082299, Order of January 15, 2003.)

Judge Willhite was appointed to act as the referee for the hearing. That hearing was held in October of 2003.

The October 2003 Evidentiary Hearing.

Ipsen was the primary witness at the October evidentiary hearing. He responded to each of the Court's reference questions:

1. Ipsen admitted presenting inconsistent evidence and argument at the two trials. (RTH at 21, 66.) With respect to whether this was intentional, Ipsen told Judge Willhite that although he could not recall his thought process at the time, he nevertheless believed the inconsistency was **not** intentional. (RTH at 21.)

2. With respect to whether (at the time of the Sakarias trial) he actually believed the victim was dead in the living room, Ipsen again testified that he could not recall his thought process at the time of Sakarias's trial. (RTH at 23.) As to whether he had reason to believe she was dead while in the living room, Ipsen admitted that he did. (RTH at 24.)

3. Ipsen testified that he did not deliberately refrain from asking Dr. Ribe about the postmortem abrasion on the victim's back. (RTH at 34-35.)

4. Ipsen explained that he did not offer the Sakarias confession into evidence against Waidla because he thought it was inadmissible.

(RTH at 35-36.)

At the conclusion of the hearing, Judge Willhite solicited briefing from all parties. In December 2003, Judge Willhite filed with the Court a 35-page written report containing his answers to the reference questions. Judge Willhite rejected almost all of Ipsen's answers as untruthful:

1. "Ipsen's argument of inconsistent factual theories to the juries in the trials of Waidla and Sakarias was an intentional strategic decision designed to fit the evidence Ipsen presented at the successive trials, to meet the proffered defense theories, and to maximize the portrayal of each defendant's culpability." (In Re Sakarias, S082299, Referee's Report on Proceedings, Evidence and Findings of Fact (Referee's's Report") at 22.)

2. "[A]t the time of the Sakarias trial, Ipsen did not believe that Piirisild was already dead when she was dragged from the living room to the bedroom. However, he had strong reason to believe that she was then dead. Further, although Ipsen also had some lesser reason to believe Piirisild may have been alive, the great weight of the evidence did not support that view." (Referee's Report at 27.)

3. "The court finds that Ipsen deliberately refrained from asking Dr. Ribe about the postmortem abrasion on Piirisild's back. He did so to tailor his evidentiary presentation to his changed theory of the hatchet wounds. The most likely interpretation of the postmortem abrasion would have been inconsistent with the theory of the killing Ipsen presented at Sakarias' trial." (Referee's Report at 29.)

4. "The court finds that Ipsen believed the confession was inadmissible against Waidla, and that therefore he did not seek [to] offer it." (Referee's Report at 34.)

The following chart will help put in perspective this Court's reference questions, Ipsen's answers to those questions and Judge Willhite's findings as to each question:

Supreme Court Reference Question	**Prosecutor Ipsen's Testimony**	**Judge Willhite's Finding**
1. Was Ipsen's use of inconsistent arguments intentional?	No, it was inadvertent. (RTH 21.)	Ipsen's use of inconsistent arguments was intentional, purposely designed to "maximize the portrayal of each defendant's culpability." (Referee's Report at 22.)
2(a) Did Ipsen believe at the time of the Sakarias trial that the victim was dead when dragged to the living room?	Ipsen could not recall what he believed. (RTH 23.)	Petitioner did not carry his burden of proving Ipsen actually believed the victim was dead when moved to the bedroom. (Referee's Report at 27.)
2(b) Did Ipsen have reason to believe the victim was dead when moved to the bedroom?	Ipsen admitted he did have reason to believe she was dead. (RTH 24.)	Ipsen had "strong reason to believe" the victim was dead when moved to bedroom based on the "great weight of the evidence." (Referee's Report at 27.)
3. At the Sakarias trial, did Ipsen deliberately refrain from introducing Ribe's testimony about the post-mortem back wound?	No, it was inadvertent. (RTH 34-35.)	Ipsen "deliberately refrained" from introducing Dr. Ribe's testimony because it was "inconsistent with the theory of the killing Ipsen presented at the Sakarias trial." (Referee's Report at 29.)

SUMMARY OF ARGUMENT

There are five separate reasons to grant a new penalty phase in this case. As explained in Argument I, this case is most easily resolved applying the traditional Due Process principles which forbid prosecutors from presenting evidence or argument they know, or should know, is false or misleading. Here, according to Judge Willhite, Ipsen deliberately presented evidence and argument which was not only unsupported by the "great weight of the evidence" of which Ipsen was aware, but ran counter to the evidence and argument Ipsen had relied on at the Waidla trial. Given the importance of this false evidence and argument to the State's case, the existence of at least four undisputed mitigating factors, and the objective record of penalty phase deliberations showing a close case, a new penalty phase is required.

Even if this were not the law, reversal would be required. As explained in Argument II, separate and apart from Ipsen's presentation of false evidence and argument, he presented fundamentally inconsistent factual theories in the two trials. And contrary to the State's theory-to-date, this was no accident; Judge Willhite found it was an "intentional strategic decision." Because such a strategy is anathema to the concept of a fair trial, Ipsen's intentional use of inconsistent theories also violates Due Process and requires a new penalty phase.

In addition to these two Due Process rationales, there is a third reason to grant relief. As explained in Argument III, even if this Court holds the Due Process Clause permitted Ipsen to present these inconsistent arguments, the Eighth Amendment requires relief. Because of the finality of capital punishment, the Eighth Amendment imposes a heightened need for reliability in the process that leads to death. Ipsen's reliance on evidence and argument which he had formally disclaimed months earlier establishes that the evidence and arguments the jury relied on were fundamentally unreliable. The death sentence in this case cannot stand under the Eighth Amendment.

In light of Judge Willhite's findings, a new penalty phase is required for a fourth reason as well. As explained in Argument IV, Judge Willhite found that Ipsen's conduct was not only deliberate, but was done to maximize his chances of obtaining a death sentence in each case. This type of manipulation of the record constitutes misconduct under either state or federal law. A new penalty phase hearing is required for this reason as well.

Finally, as explained in Argument V, the doctrine of judicial estoppel also requires a new penalty phase. That doctrine is designed to prevent litigants from playing "fast and loose" with the courts by taking inconsistent positions simply because their own interests have changed. Because Judge Willhite's findings show that is exactly what happened here, a new penalty phase is required.

ARGUMENT

I. MR. SAKARIAS WAS DEPRIVED OF HIS FEDERAL AND STATE RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY PHASE DETERMINATION WHEN IPSEN PRESENTED EVIDENCE AND ARGUMENT TO THE JURY WHICH HE KNEW, OR SHOULD HAVE KNOWN, WAS FALSE.

In a variety of different ways, the Due Process Clause provides a limit on the power of prosecutors to manipulate evidence and arguments to obtain convictions in criminal cases. Thus, Due Process requires prosecutors to disclose exculpatory evidence to the defense. (Brady v. Maryland (1963) 373 U.S. 83.) In addition to this obligation, however, the Due Process Clause also imposes upon the prosecution a distinct and in some respects more fundamental duty to correct any testimony of its own witnesses which it knows, or should know, is false or misleading. (United States v. Agurs (1976) 427 U.S. 97, 103-104. Accord Giglio v. United States (1972) 405 U.S. 150, 154; Miller v. Pate (1967) 386 U.S. 1, 6-7; People v. Mayfield (1997) 14 Cal.4th 668, 735; People v. Kasim (1997) 56 Cal.App.4th 1360, 1386.) When a prosecutor presents false or misleading testimony, reversal is required "if there is any reasonable likelihood" that the false or misleading testimony "could have affected the judgment of the jury." (In re Jackson (1992) 3 Cal.4th 578, 597. Accord United States v. Agurs, supra, 427 U.S. at p. 103.)

Miller v. Pate, provides a useful example. There, the Supreme Court reversed a

murder conviction where the prosecutor made an argument to the jury that contradicted forensic evidence of which the prosecutor had actual knowledge. In Miller, defendant was charged with murder. At trial, the state introduced a pair of underwear belonging to the defendant. The garment had a large, reddish-brown stain on it. Although various witnesses described the underwear as being stained with blood, the prosecutor knew from a forensic report -- which he elected not to offer into evidence -- that the substance was only paint. Nevertheless, in his closing argument the prosecutor argued that the stain was blood. In reversing defendant's murder conviction, a unanimous Supreme Court found the prosecutor's closing argument "deliberately misrepresented the truth." (386 U.S. at p. 6.)

Pursuant to Miller and its progeny, there are three questions to be resolved in this case. First, was there testimony at the Sakarias trial which was either false or misleading? Second, was the falsehood something Ipsen knew or should have known? And third, was Ipsen's reliance on the false evidence prejudicial? Because this is a habeas proceeding, it is petitioner's burden to establish these facts by a preponderance of the evidence. (In re Cudjo (1999) 20 Cal.4th 673, 687.) On the record of this case, petitioner has carried his burden as to all three questions.

A. Ipsen Presented Evidence And Argument At The Sakarias Trial Which He Knew Or Should Have Known Was False.

There is little doubt that Ipsen presented testimony at the Sakarias trial which was false and misleading. Here, as in Miller v. Pate, Ipsen's deliberate omission of evidence allowed him to ask the jury to infer facts that he either knew to be false or could not in good faith have believed to be true based on the explicit theory he argued in the Waidla trial. Judge Willhite found, and the evidence shows, that Ipsen knew of the post-mortem back abrasion; he had examined Dr. Ribe on the very point in the Waidla trial only months earlier. The inference that Ipsen asked the Waidla jury to draw from this wound was that the victim died in the living room:

> • "We know she was dead in the front room of her home in her living room." (RTW 2843.)
>
> • "We know she did not live to see or to be dragged back into her bedroom." (RTW 2843.)
>
> • "At the point that she was dragged into the back room, we know that [the victim] was already dead by the facts as the coroner testified." (RTW 2843.)

This inference was the cornerstone of the larger argument that Waidla had inflicted the pre-mortem, sharp-edge hatchet blow that ended the victim's life. By establishing the time and place of death through Dr. Ribe's testimony, Ipsen was able to argue that Waidla

inflicted the massive-force, pre-mortem, sharp-edge hatchet wound in the living room, and this particular blow was the "critical point" in deciding whether Waidla should die. (RTW 3069-3070.)

Yet in the Sakarias trial, although Ipsen called Dr. Ribe as a witness, he "deliberately refrained" from asking about the post-mortem back abrasion. (Referee's Report at 29.) This allowed Ipsen to argue the exact opposite of what he proved and knew to be true in the Waidla trial. By omitting the time-of-death evidence, Ipsen could now ask the jury to conclude that Sakarias deserved death because Sakarias, not Waidla, inflicted the devastating injury that "end[ed] her life." (RTS 2447. See RTS 1521-1522, 2440.)

The evidence/argument put forth at the Sakarias trial was both false and misleading. As Judge Willhite correctly concluded after reviewing all the evidence, "the great weight of the evidence" shows Ipsen was entirely correct at the Waidla trial; the victim **was** already dead when dragged to the back bedroom. (Referee's Report at 27.)

The question then becomes whether Ipsen knew, or should have known, he was presenting false or misleading testimony. For two reasons, the answer is yes.

First, only months before the Sakarias trial, Ipsen specifically asked the Waidla

jury to return a death sentence. Ipsen argued that Waidla's decision to use the sharp edge of the hatchet -- and inflict the massive-force "death blow" -- was the "critical point" justifying a death sentence. (RTW 3069-3070.) As Judge Willhite noted after watching Ipsen testify at the hearing, "it is unlikely that a competent and committed prosecutor like Ipsen, handling the severed trials of two defendants jointly charged with capital murder, would simply forget at the second trial what specific theory of the gruesome killing he presented at the first." (Referee's Report at 25.) If Ipsen did not "forget" the theory he presented at the Waidla trial, he was plainly aware that his new argument was false.

Second, Judge Willhite's specific findings in connection with the Court's reference questions compel the conclusion that Ipsen knew, or should have known, of the falsity of the theory put forth at the Sakarias trial. Judge Willhite found that although petitioner had not proven Ipsen actually believed that Piirisild was already dead when dragged to the bedroom, Ipsen "had strong reason to believe that she was then dead" based on "the great weight of the evidence." (Referee's Report at 27.) If Ipsen had "strong reason to believe" the victim was dead when dragged to the back bedroom, he plainly knew or should have known that presenting contrary evidence and argument was false, misleading or both. Yet that is exactly what he did.

At the evidentiary hearing, Ipsen testified that he simply forgot to ask Dr. Ribe about the post-mortem back abrasion. (RTH at 34-35.) Judge Willhite -- who saw and

heard Ipsen's testimony -- rejected it completely. Instead, he found that at the Sakarias trial "Ipsen deliberately refrained from asking Dr. Ribe about the postmortem abrasion on Piirisild's back. He did so to tailor his evidentiary presentation to his changed theory of the hatchet wounds." (Referee's Report at 29.) As Judge Willhite found, Ipsen knew exactly what he was doing in tailoring Ribe's testimony. This was no accident.

Judge Willhite also found that "Ipsen's argument of inconsistent factual theories to the juries in the trials of Waidla and Sakarias was an intentional strategic decision designed to fit the evidence Ipsen presented at the successive trials, to meet the proffered defense theories, and to maximize the portrayal of each defendant's culpability." (Referee's Report at 22.) This finding undercuts any notion that Ipsen was acting inadvertently when he presented a theory fundamentally at odds with the theory presented in the Waidla trial.

In sum, Ipsen presented evidence and argument in the Sakarias case which he knew, or should have known, was false or misleading. The only remaining question is prejudice.

B. Ipsen's Use Of False Evidence Requires A New Penalty Phase Because There Were At Least Four Mitigating Factors Established At Trial, The Jury Deliberated More Than 12 Hours Before Coming To A Conclusion, And The Jury Returned During Deliberations Stating That It Was Unable To Reach A Decision Whether Mr. Sakarias Should Live Or Die.

When a prosecutor presents false or misleading testimony in a criminal case, reversal is required "if there is any reasonable likelihood" that the false or misleading testimony "could have affected the judgment of the jury." (In re Jackson, supra, 3 Cal.4th at p. 597. Accord United States v. Agurs, supra, 427 U.S. at p. 103.) Under this standard, a new penalty phase is required.

The jurors were being asked to make a normative decision as to whether Mr. Sakarias would live or die. The prosecutor manipulated his evidence precisely so that he could falsely argue that the victim was still alive when Sakarias struck her, and that it was Sakarias who inflicted the massive-force hatchet blow which ended her life.

A critical factor in deciding whether a defendant gets life or death is the exact role he played in the crime. (See Penal Code § 190.3, subdivision (a)["circumstances of the crime" must be considered in determining penalty].) Here, prosecutor Ipsen manipulated the evidence to allow the jury to draw inferences of fact that made Sakarias appear more culpable than the truth would permit. Given the nature of the sentencing decision, and the significance of Sakarias's specific role in the offense to this decision, Ipsen's

manipulation of the evidence and false argument plainly "could have affected the judgment of the jury."

The State has suggested at various times in its post-conviction briefing on this subject that the issue is much ado about nothing, that the question of which defendant inflicted the pre-mortem sharp-edge hatchet blow had no bearing on the jury's verdict. But the state's newly minted view as to the insignificance of who inflicted the sharp edge hatchet wound is a far cry from what Ipsen argued to the jury itself.

In fact, the trial record shows the State took an entirely different view of the significance of this evidence at trial. As noted above, **at the Waidla trial, Ipsen vigorously emphasized that Waidla's infliction of the pre-mortem, sharp-edge blow was the "critical" reason for imposing the death penalty. (RTW 3069-3070.) Then, at the Sakarias trial, Ipsen argued that Sakarias's infliction of this blow was a strong reason to give him the death penalty. (RTS 1521-1522, 2447.) As these arguments show, and as Judge Willhite concluded, "Ipsen obviously considered infliction of the chopping wounds, especially the hemorrhagic chop wound, to be singularly important in showing each defendant's depravity." (Referee's Report at 26.) Moreover, Ipsen's forceful argument was certainly important to the jury; as Judge Kozinski has noted, "[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal." (United States v. Kojayan (9th Cir. 1993) 8**

F.3d 1315, 1323.)

Nor has this Court ever supported this type of gamesmanship. (People v. Cruz (1964) 61 Cal.2d 861, 867-868; People v. Failla (1966) 64 Cal.2d 560, 567.) Put simply, in a criminal case the state may not take a position at trial in order to convict a defendant, then take a diametrically opposite position in post-conviction proceedings in order to sustain the conviction. (People v. Cruz, supra, 61 Cal.2d at pp. 867-868.) That is exactly what the state is seeking to do here.

Equally important in assessing prejudice is the number of mitigating factors the trial court noted on the record. These included: the absence of any criminal record, Sakarias's difficult background, his youth (age 21 at the time of the crime), and the presence of mental illness so pronounced that the court was compelled to suspend criminal proceedings until Sakarias regained his mental competence at Atascadero State Hospital. (RTS 2597.) Indeed, the State itself recognizes that these mitigating factors had all been established. (In re Sakarias, S082299, Respondent's Return ("Return") at 5.)

In addition, the jury deliberated for nearly 12 hours over the course of three court days. (CT 608-611, 627.) Such a lengthy deliberation reflects a close case. (See e.g., People v. Cardenas (1982) 31 Cal.3d 897, 907 [twelve-hour deliberation was a "graphic demonstration of the closeness of this case"]; People v. Rucker (1980) 26

Cal.3d 368, 391 [nine-hour jury deliberation shows close case]; People v. Woodard (1979) 23 Cal.3d 329, 341 [six-hour deliberation].)

Finally, and perhaps most importantly, the jurors themselves said the case was so close they could not reach a decision. During the deliberations, the jury returned to the courtroom and said it was unable to reach a verdict as to whether Sakarias should live or die. (CT 608-611, 627.) This plainly shows the case was close. (See, e.g., People v. Sheldon (1989) 48 Cal.3d 935, 965 [Mosk, J., concurring and dissenting].)

In short, this was a penalty phase case with uncontradicted mitigating evidence that the jury plainly viewed as a close case. On this record, respondent will be unable to establish that Ipsen's use of a factual theory which was both false and misleading would have made no difference to the jury. (United States v. Agurs, supra, 427 U.S. at p. 103.) The writ should be granted.

II. IPSEN VIOLATED MR. SAKARIAS'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN ASKING THE JURY TO IMPOSE DEATH BASED ON A THEORY OF THE CRIME HE HAD EXPLICITLY DISAVOWED MONTHS EARLIER IN ASKING WAIDLA'S JURY TO IMPOSE DEATH.

A. Introduction.

Putting aside prosecutor Ipsen's use of false and misleading evidence and argument, reversal is required for a separate reason. As more fully discussed below, Ipsen's presentation of inconsistent theories of the crime in two separate trials violated the Due Process Clause of the state and federal constitutions.

In this regard, there is little doubt that Ipsen presented fundamentally inconsistent theories in the two trials. By refraining from presenting Ribe's testimony about the post-mortem abrasion on the victim's back, and by omitting the threatening letter Waidla wrote two months before the crime, Ipsen was able to completely change his argument for death in the two trials.

In the Waidla case, Ipsen pleaded for death because Waidla inflicted the hatchet wounds, including the massive-force hatchet wound that Ipsen called the "death blow."

He argued for a death verdict against Waidla because Waidla was "not the one who is dominated by another, but instead the facts indicate that he was the dominate [sic] person between himself and Mr. Sakarias, that he was the planner, he was the one who knew of the Piirisild home and knew of the facts surrounding the burglary, the robbery of Mrs. Piirisild." (RTW 3062.)

In the Sakarias case, Ipsen completely switched theories. He pleaded for death because it was now Sakarias who had inflicted the massive-force fatal hatchet wound. (RTS 2447.) He argued for a death verdict against Sakarias case because Waidla did **not** dominate Sakarias; instead, there was "absolutely no evidence of domination" and "in every respect, Peter Sakarias was a partner of Tauno Waidla." (RTS 2440.)

Indeed, that the arguments presented in the two trials were fundamentally inconsistent is no longer genuinely in dispute. Ipsen admitted as much in his declaration and later testimony. And in his report, Judge Willhite concluded "[t]he Waidla and Sakarias trial versions are significantly inconsistent." (Referee's Report at 26.) Moreover, Judge Willhite found the inconsistent argument "was an intentional strategic decision designed to . . . maximize the portrayal of each defendant's culpability." (Referee's Report at 22.) Given the role of the government prosecutor in a criminal trial, the use of fundamentally inconsistent theories in separate trials is not advocacy, but serious misconduct that undermines the right to a fair trial and to due process.

The Due Process Clause guarantees criminal defendants a fair trial. (Turner v. Louisiana (1965) 379 U.S. 466.) It imposes on criminal prosecutors -- as agents of the state -- a duty not simply to convict, but to seek justice. (See American Bar Association Standards for Criminal Justice (2d. Ed. 1982) § 3-1.1(b)(c); American Bar Association Code of Professional Responsibility, E. C. 7-3.) As the United States Supreme Court noted long ago, "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (Berger v. United States (1935) 295 U.S. 78, 88.)

The justification for this rule is simple. "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." (Brady v. Maryland, supra, 373 U.S. at p. 87.) Thus, the prosecutor may not be "the architect of a proceeding that does not comport with the standards of justice." (Ibid.) It is for this reason that the Due Process Clause has long been held to limit the ability of prosecutors to use unfair methods in obtaining a conviction. (See, e.g., Giglio v. United States, supra, 405 U.S. 150; Miller v. Pate, supra, 386 U.S. 1; Brady v. Maryland, supra, 373 U.S. 83; Napue v. Illinois (1959) 360 U.S. 264; Alcorta v. Texas (1957) 355 U.S. 28.)

As noted above, in the direct appeal of this case this Court held that the question of

inconsistent theories was more appropriately litigated in the context of habeas proceedings. (22 Cal.4th at p. 635.) Citing the separate opinions from the then-recent en banc decision in Thompson v. Calderon (9th Cir. 1997) 120 F.3d 1045 (en banc), rev'd. on other grounds, 523 U.S. 538 (1998), the Court noted there were several possible approaches to the question of inconsistent verdicts. (22 Cal.4th at pp. 633-635.) As will be discussed below, under the facts of this case, reversal is required no matter which of these approaches is used. The writ should be granted and a new penalty phase ordered.

B. Because Ipsen Intentionally Presented Inconsistent Theories And Facts Regarding The Same Crime In Order To "Maximize The Portrayal Of Each Defendant's Culpability" And Thereby "Make The Most Compelling Argument" For Death In Each Case, Due Process Has Been Violated And A New Penalty Phase Is Required.

The first approach this Court noted in Sakarias was put forth by Judge Fletcher in her plurality opinion in Thompson. (People v. Sakarias, supra, 22 Cal.4th at p. 632.) Judge Fletcher concluded that under the Due Process clause "when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." (Thompson v. Calderon, supra, 120 F.3d at p. 1058.) Other federal courts agree. (See, e.g., Smith v. Groose (8th Cir. 2000) 205 F.3d 1045, 1051-1052; United States v. Kattar (11th Cir. 1988) 840 F.2d 118, 128; Drake v. Kemp (11th Cir. 1985) 762 F.2d 1449, 1479 (conc. opn. of Clark, J.).) Under this view, there is "a prejudicial due process violation in

the inconsistency itself." (People v. Sakarias, supra, 22 Cal.4th at p. 634.) As one judge has concluded in addressing this very issue, "the integrity of the judicial system commands that citizens can rest assured that prosecutors are seeking truth and justice; and that when they find truth and justice they cannot seek a different truth and a different justice from the first." (Nichols v. Collins (S.D.Tex. 1992) 802 F.Supp. 66, 74, rev'd on other grounds, Nichols v. Scott (5th Cir. 1995) 69 F.3d 1255.)

A new penalty phase is required under this approach. Ipsen presented inconsistent facts in the two cases. He presented inconsistent theories in the two cases. As Judge Willhite correctly found after reviewing the transcripts of both cases, "[t]he Waidla and Sakarias trial version are significantly different." (Referee's Report at 26.) And this was no accident; "Ipsen's argument of inconsistent factual theories to the juries in the trials of Waidla and Sakarias was an intentional strategic decision designed to . . . maximize the portrayal of each defendant's culpability." (Referee's Report at 22.) Ipsen switched theories in Sakarias precisely so he could "make the most compelling argument [for death] possible . . . ." (Referee's Report at 26.) Despite having "strong reason to believe" that the victim died in the living room -- and that Waidla therefore inflicted the fatal wound -- Ipsen not only argued the exact opposite, but he "deliberately refrained" from introducing the contrary forensic evidence on which he had relied at the Waidla trial. (Referee's Report at 27, 29.)

Nor has the State ever argued that Ipsen switched theories intentionally because he became aware of new evidence between the two trials. To the contrary, in its formal Return, the State's position was quite clear: Ipsen's switch in theories "was inadvertent." (In re Sakarias, S082299, Respondent's Return at 30.) Indeed, in preparing its Return, the State even attached a declaration from Ipsen which explained that he did **not** intentionally switch theories or take inconsistent positions in the two trials, but simply did so because he forgot the theory he had presented at the Waidla trial. (Ipsen Declaration at para. 2, 4, 6.)[4]

Under the Thompson plurality's view of the inconsistent theory issue, a new penalty phase is required.

---

[4] Ipsen's testimony at the evidentiary hearing confirmed this point. Ipsen admitted that before the Waidla trial began, he had access to the confessions of both defendants, the police reports and the autopsy report. (RTH at 54, 57.) He also admitted that prior to the Sakarias trial, none of this information had changed, nor had Dr. Ribe changed his opinion as to the post-mortem nature of the back wound. (RTH at 59.) In fact, Ipsen was not even sure he met with Dr. Ribe prior to the Sakarias trial. (RTH at 16.) Thus, Ipsen's switch in theories was "unintentional." (RTH at 21.) Nor did he deliberately refrain from introducing Dr. Ribe's testimony about the post-mortem abrasion on the victim's back; this too was an accident. (RTH at 34.)

C. Because Ipsen Presented Inconsistent Theories In The Two Cases, And Because The "Great Weight" Of Evidence Shows That The Theory Presented In The Sakarias Trial Was False, A New Penalty Phase Is Required.

The second approach to this issue which this Court noted in its opinion was articulated by Judge Tashima in his concurrence in Thompson. (People v. Sakarias, supra, 22 Cal.4th at p. 634.) Judge Tashima took a slightly different approach from Judge Fletcher. He agreed that Due Process is violated when a prosecutor pursues inconsistent theories in two trials. (Thompson v. Calderon, supra, 120 F.3d at p. 1063.) In his view, however, when a prosecutor presents inconsistent theories against two defendants, only one of the two defendants is actually prejudiced. (Ibid.) And in order to determine which of the defendants is prejudiced, it is necessary to have "a finding of which of the two inconsistent theories pursued by the prosecutor represents the true facts and which is false." (Ibid.)

Under Judge Tashima's analysis, a Due Process violation has plainly occurred in this case. As discussed above, Ipsen intentionally presented inconsistent evidence and arguments in the two trials. That violates Due Process. Under Judge Tashima's view, the only real question is which defendant was prejudiced?

As to this question, there is a wrinkle. Among the witnesses petitioner Sakarias proffered for the evidentiary hearing was Dr. Paul Hermann. (In re Sakarias, S082299, Petitioner's Traverse, Declaration of Dr. Paul Hermann, attached to the Traverse as Exhibit A; Petition for Writ of Habeas Corpus, Declaration of Dr. Paul Hermann, attached to the Habeas Petition as Exhibit 26; Witness List of July 30, 2003 [naming Dr. Paul Hermann].) Dr. Hermann reviewed the forensic evidence in this case and concluded that Ipsen and Dr. Ribe were correct in the Waidla trial -- the victim **was** killed in the living room. (In re Sakarias, S082299, Exhibit A to Petitioner's Traverse at para. 9-10.) In other words, Dr. Hermann would have provided expert testimony as to "which of the two inconsistent theories pursued by the prosecutor represents the true facts and which is false." (Thompson v. Calderon, supra, 120 F.3d at p. 1063 [Tashima, J., concurring].)

Prior to the evidentiary hearing, however, the State objected to Dr. Hermann's testimony. (RT 10/22/03 at 31.)[5] In response, petitioner explained that one purpose for calling Dr. Hermann was to establish that the forensic evidence showed, in fact, the victim was killed in the living room. (RT 10/22/03 at 33.) Counsel cited the court to the portion of this Court's opinion in People v. Sakarias, supra, 22 Cal.4th 596 specifically discussing Judge Tashima's view of the inconsistent theories issue. (RT 10/22/03 at 36.)

[5] "RT 10/22/03" refers to the Reporter's Transcript of Proceedings covering the pre-hearing proceedings in this case, held on March 28, 2003, May 28, 2003, July 1, 2003 and October 22, 2003.

Counsel specifically argued that one purpose of the evidentiary hearing was "to see who was prejudiced [by learning] where [the victim] did die." (RT 10/22/03 at 33.) In a written order, the trial court sustained the state's objection to Dr. Hermann and ruled his testimony inadmissible. (In re Sakarias, A711340, Clerk's Minutes of 10/22/03.)

The fact remains, however, that Judge Willhite reviewed the record of the two trials, heard Ipsen testify, and reached "a finding of which of the two inconsistent theories pursued by the prosecutor represents the true facts and which is false." (Thompson v. Calderon, supra, 120 F.3d at p. 1063 [Tashima, J. concurring].) Judge Willhite concluded that the "great weight of the evidence" supported the view that the victim died in the living room -- the precise theory presented at the Waidla trial. (Referee's Report at 27.) In contrast, there was only a "a window of doubt, slight though it may have been" supporting the notion that the victim was still alive when pulled to the back bedroom -- the precise theory Ipsen presented at the Sakarias trial. (Referee's Report at 27.) In other words, the "true facts" were those Ipsen argued at the Waidla trial; the factual theory Ipsen argued at the Sakarias trial was false.[6]

---

[6] Indeed, the state does not really dispute this point. **To the contrary, the State actually relied on petitioner's position as to the forensic evidence in opposing co-defendant Tauno Waidla's request for post-conviction relief on his inconsistent theories claim. There, in opposing Mr. Waidla's habeas petition, the State argued "assuming arguendo that [petitioner's expert] Dr. Hermann's conclusion is correct, it is somewhat likely that petitioner [Waidla] inflicted the hemorrhagic chopping wound since both petitioner [Waidla] and Sakarias stated that petitioner [Waidla] used the hatchet against the victim in the living room and only gave the hatchet to**

Under Judge Tashima's view, a Due Process violation has occurred. Because Judge Willhite found that the "great weight" of the evidence established that the

---

Sakarias after the victim had been dragged to the bedroom." (In re Tauno Waidla, S102401, Return to Petition for Writ of Habeas Corpus ("Waidla Return") at 23.) Similarly, **respondent conceded that Ipsen's characterization of Waidla as the dominant party was fair and accurate. (Waidla Return at 23-24.)**

prosecutor's theory in the Waidla case was the correct one, Mr. Sakarias was prejudiced. A new penalty phase is required.[7]

---

[7] There is, of course, a fundamental unfairness in (1) objecting to evidence which would have established prejudice under Judge Tashima's approach (i.e. Dr. Hermann's testimony showing that Ipsen's theory in the Sakarias case was false) and then (2) arguing that relief cannot be granted because there is no showing of prejudice. (Compare **Simmons v. South Carolina (1994) 512 U.S. 154, 168-169 [Due Process does not permit the state to argue future dangerousness to the public as a reason to sentence defendant to death while at the same time exclude evidence from defendant showing that he would never get out of prison]; Crane v. Kentucky (1986) 476 U.S. 683, 690-691 [Due Process does not permit the state to rely on a defendant's confession while at the same time exclude evidence from defendant explaining why the confession was unreliable].)**

Because this case involves simultaneous briefing, petitioner does not yet know if the State will make this argument. In any event, because Judge Willhite concluded the Waidla theory was supported by the "great weight of the evidence," there is no need to dwell on whether the State, having prevented petitioner from introducing evidence on the prejudice question, can now properly assert a harmless error theory.

D. Because Ipsen Presented Inconsistent Facts And Argument When He Had Reason To Believe That Both Were False, A New Penalty Phase Is Required.

The third approach noted by this Court was that of Judge Kozinski in Thompson. (People v. Sakarias, supra, 22 Cal.4th at p. 634.) Judge Kozinski took a very different approach. Although he found the presentation of inconsistent theories "mightily troubl[ing]," Judge Kozinski believed that the problem was best handled by applying the Due Process cases which preclude a prosecutor from presenting testimony which "he knows, or has **reason to believe**, is false." (Thompson v. Calderon, supra, 120 F.3d at pp. 1170-1171, emphasis added [Kozinski, J., concurring].)

For many of the same reasons as set forth in Argument I, supra, application of Judge Kozinski's approach to this case requires reversal. As noted there, Judge Willhite made two critical findings about the prosecutor's presentation at the Sakarias trial. First, Judge Willhite found that based on the "great weight of the evidence" Ipsen "had strong reason to believe that [the victim] was . . . dead" when dragged to the bedroom. (Referee's Report at 27.) In fact, Judge Willhite's findings that Ipsen had "strong reason to believe" the theory he presented at the Sakarias trial was wrong mirrors the exact "reason to believe" standard Judge Kozinski proposed in Thompson.

Equally important is Judge Willhite's finding that Ipsen's switch in facts and

theories was no accident. Judge Willhite specifically found that "Ipsen deliberately refrained from asking Dr. Ribe about the postmortem abrasion on Piirisild's back. He did so to tailor his evidentiary presentation to his changed theory of the hatchet wounds." (Referee's Report 29.) More generally, Judge Willhite found that "Ipsen's argument of inconsistent factual theories to the juries in the trials of Waidla and Sakarias was an intentional strategic decision designed to fit the evidence Ipsen presented at the successive trials, to meet the proffered defense theories, and to maximize the portrayal of each defendant's culpability." (Referee's Report at 22.)

Thus, not only did Ipsen have "reason to believe" the factual theory he argued in the Sakarias case was false, he deliberately selected this theory in order to "maximize" his chance of getting a death sentence in the Sakarias case. This is the precise situation in which Judge Kozinski's approach requires reversal.[8]

[8] The same analysis is required under the fourth approach to this issue, penned by Judge Kleinfeld. (People v. Sakarias, supra, 22 Cal.4th at p. 634.) Judge Kleinfeld's view varied only slightly from Judge Kozinski's approach. In his view, inconsistent theories are permissible absent evidence "that the prosecutor knew or thought" that one theory was correct. (Thompson v. Calderon, supra, 120 F.3d at p. 1074 [Kleinfeld, J., concurring].) Reversal is required under this approach as well, given Judge Willhite's

findings, just discussed, that (1) Ipsen had reason to believe his new theory was wrong and (2) he nevertheless advanced the theory intentionally.

III. IPSEN'S REQUEST THAT THE JURY SENTENCE SAKARIAS TO DIE BASED ON FACTS (AND A THEORY OF THE CRIME) IPSEN HAD SPECIFICALLY DISCLAIMED AT THE WAIDLA TRIAL VIOLATES THE EIGHTH AMENDMENT.

Separate and apart from the Due Process grounds discussed above, a new penalty phase is compelled by the Eighth Amendment. The United States Supreme Court has recognized the death penalty is a qualitatively different punishment than any other. (See, e.g., Beck v. Alabama (1980) 447 U.S. 625, 638, n.13; Woodson v. North Carolina (1976) 428 U.S. 280, 305.) In light of the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. (See, e.g., Caldwell v. Mississippi (1985) 472 U.S. 320, 323; Beck v. Alabama, supra, 447 U.S. at p. 638, n.13.)

Procedures which interfere with the presentation and consideration of reliable information undercut this heightened need for reliability and therefore violate the Eighth Amendment. (See, e.g., Lankford v. Idaho (1991) 500 U.S. 110, 127; Gardner v. Florida (1977) 430 U.S. 349, 362; Lockett v. Ohio (1978) 438 U.S. 586.) This is so even when those same procedures do not violate the Due Process clause. (See, e.g., Beck v. Alabama, supra, 447 U.S. at p. 636-638 [in a capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process may not]. See Sawyer v. Smith (1990) 497 U.S. 227, 235 [Court distinguishes between the protections of the due process clause and the "more particular guarantees of sentencing

reliability based on the Eighth Amendment."].)

Here, even if Ipsen's presentation of inconsistent facts and argument does not violate the Due Process clause, it certainly violates the "heightened need for reliability" in capital cases. In the Sakarias case, Ipsen obtained a death sentence inconsistent with uncontradicted forensic evidence he had presented and accepted as true in the Waidla trial. This forensic evidence was never presented to the Sakarias jury.

In other words, Ipsen asked the jury to sentence Sakarias to die based on evidence and a theory of the case that he had specifically disclaimed in asking the jury to sentence Waidla to die. This approach to capital litigation -- an approach Judge Willhite found was intentionally crafted to maximize the culpability of each defendant in each trial -- raises the substantial risk of an unreliable death sentence. Even if the Due Process Clause tolerates this type of "give" in the criminal justice system, the Eighth Amendment will not tolerate it in the more rigorous context of capital sentencing. A new penalty phase is required.

IV. IPSEN'S INTENTIONAL MANIPULATION OF THE FACTUAL RECORD, AND HIS RELIANCE ON INCONSISTENT THEORIES IN ORDER TO MAXIMIZE THE PORTRAYAL OF EACH DEFENDANT'S CULPABILITY, CONSTITUTES PROSECUTORIAL MISCONDUCT AND REQUIRES A NEW PENALTY PHASE.

As discussed in Arguments I-III, supra, Ipsen's deliberate manipulation of the evidence, and his reliance on inconsistent factual theories, violated both the Fifth, Fourteenth, and Eighth Amendments. Separate and apart from these violations, however, a new penalty phase is required because Ipsen's conduct also constituted prosecutorial misconduct.

"It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (Berger v. United States, supra, 295 U.S. at p. 88.) Thus, under the federal constitution, a prosecutor commits prejudicial misconduct when his conduct "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." (Darden v. Wainwright (1986) 477 U.S. 168, 181. Accord People v. Earp (1999) 20 Cal.4th 826, 858.) A prosecutor commits misconduct when he "manipulate[s] or misstate[s]" the evidence. (Darden v. Wainwright, supra, 477 U.S. at p. 182.) Misconduct will require a new penalty phase where it prejudices a defendant's right to a fair sentencing hearing, regardless of whether the misconduct was intentional or inadvertent. (See People v. Hill (1998) 17 Cal.4th 800, 822.)

Even where the misconduct does not render the sentencing hearing unfair, however, state law will require a new penalty phase if the prosecutor's misconduct involves "the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (People v. Morales (2001) 25 Cal.4th 34, 44.) Under this standard, a new penalty phase is required whenever there is a reasonable probability that a more favorable result would have occurred absent the misconduct. (See People v. Haskett (1982) 30 Cal.3d 841, 865.)

Here, Judge Willhite found that Ipsen intentionally manipulated the evidence in this case. Ipsen "deliberately refrained" from presenting any testimony about the post-mortem abrasion on the victim's back. (Referee's Report at 29.) He did so because such evidence "would have been inconsistent with the theory Ipsen presented to the jury" in the Sakarias trial. (Id. at 31.) As Judge Willhite concluded, in the context of the Sakarias trial, this evidence was "much easier to omit than explain;" Ipsen did not introduce it because "it would call the jury's attention to facts that were inconvenient to Ipsen's theory" that Sakarias inflicted the massive-force fatal chop wound. (Id. at 32, 33.)

Judge Willhite made similar findings with respect to Ipsen's more general decision to argue inconsistent theories at the two trials. Ipsen made "an intentional strategic decision" to argue inconsistent theories, once again "to maximize the portrayal of each defendant's culpability." (Referee's Report at 22.) Ipsen took this course despite

knowing that "the great weight of the evidence" supported the theory he himself had put forth in the Waidla trial. (Referee's Report at 27.) And, as Judge Willhite found, Ipsen's argument in the Sakarias case was no accident; it was designed to "enhance the view of Sakarias' culpability." (Id. at 25.)

There is no need to make fine arguments as to whether Ipsen's conduct constituted misconduct under the state or federal standards. It was improper under both. Under federal law, this is the precise type of "manipulation" which the Supreme Court envisioned as misconduct in Darden v. Wainwright. (477 U.S. at p. 182.) And under state law, regardless of whether Ipsen's conduct is characterized as "reprehensible," it certainly constituted "the use of [a] deceptive . . . method[] to attempt to persuade either the trial court or the jury." (People v. Morales, supra, 25 Cal.4th at p. 44. Accord United States v. Duke (8th Cir. 1995) 50 F.3d 571, 578, n.4 [stating that the prosecutor has a "duty to serve and facilitate the truth-finding function of the courts."]; Davis v. Zant (11th Cir. 1994) 36 F.3d 1538, 1548, n.15 ["[P]rosecutors have a special duty of integrity in their arguments."]; United States v. Myerson (2d Cir. 1994) 18 F.3d 153, 162, n.10 ["[T]he prosecutor has a special duty not to mislead."].)

For many of the same reasons as discussed above, a new penalty phase is required. As Ipsen himself recognized by focusing on the circumstances of the crime in asking the two juries to impose death, the exact role played by a capital defendant in the charged

homicide is an extremely important factor in deciding if that defendant will live or die. Similarly, in the context of a two-person crime, both the capital sentencing statute and the case law recognize the importance of evidence regarding the relative culpability of the two defendants. (Pen. Code, ¶ 190.3, subd. (k); People v. Malone, supra, 47 Cal.3d at p. 58; Green v. Georgia, supra, 442 U.S. at p. 97.)

Here, Ipsen's manipulation of the evidence and his use of inconsistent arguments impacted both of these critical areas. And while there may be some cases in which this type of conduct could be harmless under both the state and federal standards, this is not such a case. As noted above, **the trial court itself recognized there were at least four mitigating factors which had been established, including that Mr. Sakarias (1) had no prior criminal record, (2) had a difficult background, (3) was only 21 years old at the time of the crime, and (4) was mentally ill. (RTS 2597.) Moreover, the penalty phase jury deliberated for nearly 12 hours over the course of three court days. (CT 608-611, 627.) During these deliberations, the jury returned to the courtroom and said it was unable to reach a verdict as to whether Sakarias should live or die. (CT 608-611, 627.)**

On this record, the misconduct in this case cannot be deemed harmless. "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (United States v. Kojayan, supra, 8 F.3d at p. 1323.) A new

penalty phase is required.[9]

[9] This is especially so in light of Justice Broussard's observation that in assessing prejudice, "[a] hung jury is a more favorable verdict" than a guilty verdict. (People v. Brown (1988) 46 Cal.3d 432, 471, n.1, conc. opn. of Broussard, J.)

V. BECAUSE IPSEN PLAYED FAST AND LOOSE WITH THE COURT -- INTENTIONALLY MANIPULATING HIS EVIDENCE AND ARGUMENT TO SUIT THE EXIGENCIES OF THE MOMENT -- THE DOCTRINE OF JUDICIAL ESTOPPEL REQUIRES A NEW PENALTY PHASE.

Putting aside all questions of Due Process, the Eighth Amendment and prosecutorial misconduct, there is yet another reason to grant relief in this case: the doctrine of judicial estoppel. As the Supreme Court has recently explained, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (New Hampshire v. Maine (2001) 532 U.S. 742, 749.) The purpose of the judicial estoppel doctrine is to "to protect the integrity of the judicial process . . . [by] prohibiting parties from deliberately changing positions according to the exigencies of the moment." (Id. at pp. 749-750.) Or, as Judge Trott wrote in applying the doctrine against the state in a criminal case, it is "intended to protect against a litigant playing 'fast and loose with the courts." (Russell v. Rolfs (9th Cir. 1990) 893 F.2d 1033, 1037.)

Concern with the integrity of the judicial system is not confined to the federal courts. California courts have recognized that "[j]udicial estoppel is an equitable doctrine aimed at preventing fraud on the courts" by "prohibit[ing] a party from taking inconsistent positions in the same or different judicial proceedings." (M. Perez Co. v.

Base Camp Condominiums Ass'n No. One (2003) 111 Cal.App.4th 456, 463.) In California courts, too, the doctrine "is intended to protect against a litigant playing fast and loose with the courts." (Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181.) "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (Ibid.)

A split of authority exists as to whether the doctrine applies in criminal cases. Some courts have held judicial estoppel cannot apply against the state in criminal cases. (See, e.g., United States v. McCaskey (5th Cir. 1993) 9 F.3d 368, 378.) Others have either held it can apply against the state or have actually applied it. (See, e.g., Russell v. Rolfs, supra, 893 F.3d 1033 [applying judicial estoppel against the state in a habeas case challenging a criminal conviction]; State v. Towery (Ariz. 1996) 920 p.2d 290, 304 [recognizing that "the doctrine of judicial estoppel is no less applicable in a criminal than in a civil trial."]; People v. Gayfield (Ill. 1994) 633 N.E.2d 919, 925.) This Court has never decided the point.

Given the fundamental policies protected by the doctrine of judicial estoppel, there is no reason not to apply it in this case. There is no logical reason why prosecutors, who are charged with seeking justice and truth, should be permitted to play "fast and loose with the courts." Nor is there any reason why prosecutors, alone among litigants in our

courts, should be permitted "to chang[e] positions according to the exigencies of the moment." Put simply, where new evidence has not arisen between two criminal trials, the doctrine of judicial estoppel should prevent prosecutors from intentionally switching their evidence and arguments in trying two defendants for the same crime. Judicial estoppel should apply to prosecutors just as it applies to all other litigants.

Applying the doctrine to this case is straightforward. There are five requirements to be met: (1) the same party must have taken inconsistent positions, (2) the positions were taken in judicial proceedings, (3) the party was successful in asserting the first position, (4) the two positions are actually inconsistent and (5) the first position was not taken as a result of ignorance or mistake. (Jackson v. County of Los Angeles, supra, 60 Cal.App.4th at p. 183.) Here, all five requirements are met: as Judge Willhite found, Ipsen intentionally took inconsistent positions in the two trials as a matter of strategy. And it seems plain that his first position (taken at the Waidla trial) was successful because, in fact, the Waidla jury imposed a death sentence.

Prosecutors should not be above the rules that the rest of us have to follow. Ipsen's conduct in this case undercut the integrity of the judicial system and should not be countenanced. A new penalty phase is required.

CONCLUSION

The public rightfully believes that the goal of a prosecutor is not to seek convictions, but to seek the truth. Here, the prosecutor sought one truth in the Waidla trial and a different truth in the Sakarias trial. The prosecutor's intentional conduct in this case turned what should have been a search for truth into a game won by the more clever adversary. That is not what capital trials should be about. A new penalty phase is required.

Dated: _____

Respectfully submitted,

CLIFF GARDNER
ROBERT DERHAM

By_____
Cliff Gardner
Attorney for Petitioner

TABLE OF CONTENTS